

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff-Respondent,	§	
	§	
V.	§	CRIMINAL ACTION NO. H-10-609
	§	CIVIL ACTION NO. H-12-3147
SANDRA ELIZABETH CUNNINGHAM,	§	
	§	
Defendant-Movant.	§	

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is the United States' Motion to Dismiss (Document No. 74) and Defendant/Movant Sandra E. Cunningham's Motion and Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Document Nos. 58 & 76). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that the Government's Motion to Dismiss be GRANTED and that Cunningham's § 2255 Motion, and Amended § 2255 Motion be DENIED and DISMISSED WITH PREJUDICE. Cunningham filed timely Objections to the Memorandum and Recommendation (Document No. 82). The Court, after having made a *de novo* determination of the Government's Motion to Dismiss, Cunningham's § 2255 Motion and Amended § 2255 Motion, the Magistrate Judge's Memorandum and Recommendation, and the Order filed on May 28, 2013, which granted Cunningham's Motion for Leave to Amend, but "without prejudice to consideration" of the Government's timeliness arguments, is of the opinion that the findings and recommendations of the Magistrate Judge are correct

and should be and hereby are accepted by the Court in their entirety. Therefore,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed and filed on June 3, 2013, which is adopted in its entirety as the opinion of the Court, that the Government's Motion to Dismiss (Document No. 74) is GRANTED and Movant Sandra E. Cunningham's Motion and Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Document Nos. 56 & 78) are DENIED and DISMISSED with prejudice. It is further

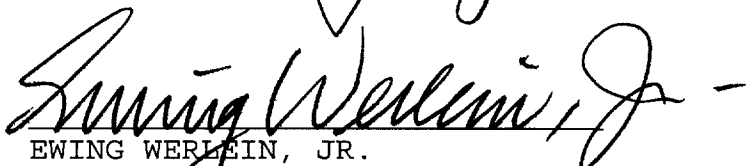
ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604; Beazley v. Johnson, 242 F.3d 248, 263 (5<sup>th</sup> Cir.), cert. denied, 122

S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. Alexander v. Johnson, 211 F.3d 895, 898 (5<sup>th</sup> Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, which has been adopted as the opinion of the Court, the Court determines that Movant has not made a substantial showing of the denial of a constitutional right.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 27<sup>th</sup> day of July, 2013.

  
EWING WERLEIN, JR.  
UNITED STATES DISTRICT JUDGE